Summary of Empirical Data Relevant to Various Panels of Federal Trade Commission (FTC) Workshop on Protecting Consumer Interests in Class Actions

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This document presents empirical data (from Federal Judicial Center studies) that are directly relevant to topics to be addressed in panels that precede the Tuesday morning panel in which I will participate. My hope is that participants will consult the following empirical data early in the workshop. Such data seems most useful if examined at the outset of a program or at the beginning of a policy discussion.

To facilitate further use of FJC research on class actions, I am attaching the Executive Summaries of two major studies of the class action litigation process.[1] Both studies were conducted at the request of the Judicial Conference's Advisory Committee on Civil Rules to assist the committee's examination and revision of Federal Rule of Civil Procedure 23. Full copies of the reports are available at http://www.fjc.gov, under "Publications," "Class Action Litigation." Below I present excerpts and summaries from those studies, arranged under the panel topic to which they seem most relevant.

Valuation of Class Action Settlements: Coupon Settlements (Panel #1)

2004 FJC Study:

One specific element involved in the valuation of class action settlements is the extent to which coupons were included in the settlement and the associated problems of estimating or otherwise taking into account coupon redemption rates. We have data on the use of coupons in class actions based on a survey of attorneys in a representative sample of class actions terminated between July 1, 1999 and December 31, 2002. The following text and table are excerpted from our report of that study[2]:

> *Nonmonetary recovery.* Table 17 shows the frequency of providing four types of nonmonetary relief in a class recovery: transferable and nontransferable coupons, injunctive relief, and cy pres/public interest remedies. Altogether these nonmonetary remedies were the sole remedies provided to the class in 15 cases. The total numbers in Table 17 include cases in which there was no class recovery, monetary or otherwise.

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[*] Any views presented are my own and not necessarily those of the Federal Judicial Center or the Judicial Conference's Advisory Committee on Civil Rules. The data presented are the product of Center work conducted at the request of the Advisory Committee in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration.

[1] Thomas E. Willging & Shannon R. Wheatman, Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation (Federal Judicial Center April 2004) ("2004 FJC Study"); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts (Federal Judicial Center 1996) ("1996 FJC Study"). Both studies are available at http:/www.fjc.gov. Another, somewhat shorter, version of the 1996 study was published as Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74 (1996).

[2] 2004 FJC Study, *supra* note 1 at 45 (footnotes renumbered).

Table 17

Form of nonmonetary relief in closed class action cases

Form of relief	Total of all reports, including monetary recovery (N=318)	No monetary recovery (N=166)	No monetary recovery and no other nonmonetary recovery (Ns=152-156)
Transferable coupons	19 (6%)	8 (5%)	6 (4%)
Nontransferable coupons	10 (3%)	3 (2%)	2 (1%)
Injunction	29 (9%)	6 (3%)	5 (3%)
Cy Pres Class/Public Interest award	4 (1%)	3 (2%)	2 (1%)

Courts and commentators have criticized the use of coupons, particularly nontransferable coupons with no market value, to settle class action lawsuits.[3] As Table 17 shows, attorneys reported that transferable coupons were part or all of the recovery in 19 cases (6% of all cases). Of those cases, 8 (5% of cases without a monetary recovery) had no monetary recovery, and in 6 cases (4% of cases with no other recovery), transferable coupons represented the only remedy provided to the class.[4] Nontransferable coupons were reported in 10 cases (3% of all cases), all but 3 of which (2% of cases with no monetary recovery) were accompanied by a monetary recovery for the class. In 2 cases (1% of cases with no other recovery), nontransferable coupons were the sole remedy for the class.

1996 FJC Study

In our 1996 study of closed class actions in four federal districts, we did not focus separately on coupons, cy pres awards, injunctive relief, or other forms of nonmonetary relief. We did however, distinguish between cases that included the distribution of monetary benefits to class members and cases that did not. We found that in two districts 82% of certified settled class action had monetary distributions to a class and in the other two districts 53% of such cases had such distributions.[5]

Neither of the two studies documented coupon redemption rates.

[3] *See, e.g., In Re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F. 3d 768, 808-09 (3d Cir. 1995); see also Deborah Hensler, et al, Class Action Dilemmas 488-89 (2000).

[4] We did not obtain information about whether the transferable coupons were in fact marketable.

[5] 1996 FJC Study, *supra* note 1 at 68 (footnotes renumbered)

Tools for ensuring that settlements are "fair, reasonable, and adequate" (Panel #2)

Both FJC studies documented the outcome of judicial review of proposed settlements, which were almost always approved. In a small percentage of cases, approval was conditioned on revision of the proposed settlement. The 1996 study included an examination of the nature and extent of settlement review hearings, including the extent to which class members and objectors participated in the process.

2004 FJC Study

In the current study, all cases certified for settlement in fact settled. A small percentage (5%) settled only after the parties revised a proposed settlement. Cases certified for trial and litigation usually settled, but not always. Table 15 shows the outcomes for class actions certified for trial and litigation compared with class actions certified for settlement only.

Table 15: Comparison of case outcomes for class actions certified for trial and litigation and class actions certified for settlement (N=125)

Outcomes of Certified Class Actions	Certified for Trial and Litigation (N=52) (42%)	Certified for Settlement (N=73) (58%)
Classwide settlement approved*	38 (72%)	69 (95%)
Classwide settlement revised and approved	2 (3%)	4 (5%)
Classwide settlement proposed and not approved by court	1 (2%)	0
Class representative settled individually	1 (2%)	0
Classwide trial resulting in plaintiff judgment	3 (6%)	0
Classwide trial resulting in defendant judgment	3 (6%)	0
Case dismissed on merits	5 (10%)	0
Case dismissed on other grounds	2 (4%)	0

Note: Categories may exceed 100% because respondents could select more than one category.
*Differences are statistically significant at the .05 level.

1996 FJC Study

Notice & Hearing

Notice of class certification or of the settlement or voluntary dismissal of a class action was sent to class members in at least 76% of the certified class actions in each of the four districts (see Figure 36). Although notice of certification before settlement is not required in (b)(1) and (b)(2) actions, the majority of such cases included some notice (see

Table 35). Generally the notice in those cases was notice of settlement, but a sizable minority included personal notice of class certification. As noted above, Rule 23(e) calls for notice of settlement in all certified class actions. In six settled (b)(2) class actions, however, no notice to the class or hearing regarding the settlement was indicated on the record.

In the (b)(3) certified class actions, notice of certification or settlement was sent in all but six of the cases in the study.[Omitted footnote indicates that these cases were dismissed or remanded].[6]

Participation by class members and objectors

Our data permit us to document the objections raised by class members and other objectors and, within limits, to document their attendance at settlement approval hearings. Except in E.D. Pa., however, we were generally unable to obtain transcripts of the settlement approval hearings, so our report of attendance in the other three districts is based on clerical entries that seem likely to undercount the participation of class members and objectors. With this caveat, court files indicate that nonrepresentative parties were recorded as attending the settlement hearing infrequently, with 14% in E.D. Pa. being the high mark and the other three districts showing 7% to 11% rates of participation (see Figure 53). Attendance of representative parties was also mixed. Again, E.D. Pa. had the highest rate, 46%, and the other districts varied from 11% to 28% (see Figure 53; *see also supra* § 4 (c)).

Participation by filing written objections to the settlement was far more frequent than participation by appearing at the settlement hearing. Generally, objectors filed their objections in writing before the hearing. Typically, the parties addressed the objections in the final motion for approval of the settlement. Overall, about half of the settlements that were the subject of a hearing generated at least one objection. The percentage of cases in which there was no objection ranged from 42% to 64% in the four districts (see Table 38).

The most frequent type of objection was to the amount of attorneys' fees as being disproportionate to the amount of the settlement; in 14% to 22% of the cases in the four districts, objectors raised this point (see Table 38). The next most frequent objection related to the insufficiency of the award to compensate class members for their losses. Next in line were objections that the settlement disfavored certain subgroups. A wide variety of objections were grouped in a miscellaneous category. Many of the miscellaneous objections raised serious concerns that were difficult to categorize.[7]

Outcomes of objections and hearings

How did the courts respond to the objections? Approximately 90% or more of the proposed settlements were approved without changes in each of the four districts. In a small percentage of cases, the court approved the settlement conditioned on the inclusion of specified changes. Overall in the four districts, judges made changes in nine settlements before approving them. In seven of these cases, objections had been raised and the changes may have been responsive to those objections, but our data do not permit us to examine that relationship systematically.

[6] *Id.* at 46 (footnotes omitted).

[7] *Id.* at 57 (footnotes omitted).

> Similar results were obtained for specific objection to the amount of fees requested. Overall, in twenty-one cases, objections to the amount of attorneys' fees were filed. In nineteen of those twenty-one cases the court awarded 100% of the request and in the other two the court awarded less than the full fee request.208 (For a comprehensive discussion of the courts' treatment of attorneys' fees in the study cases, *see infra* § 16.)
>
> Our study was not designed to trace the responses to each objection, but our general impression is that the parties summarized and discussed most objections in a motion for settlement approval. The parties generally filed such a motion after the deadline for filing objections had passed, shortly before the settlement approval hearing. Many of the settlement approval orders, which were typically prepared by the parties for the judge's signature, specifically addressed objections.[8]

Appointment of special masters or magistrate judge to evaluate settlements

Such appointments were rare. In the 1996 study, we found 2 appointments in the 126 proposed settlements of certified class actions and found that neither of those appointments contemplated an evaluation of the merits of the proposed settlement.[9] Judges more often appointed magistrate judges to assist in the settlement process, but most often those appointments were to facilitate settlement. In an unspecified percentage of those appointments, a magistrate judge was asked to make a recommendation about the merits.[10]

The Manual for Complex Litigation, Fourth (2004) states that generally reviewing a proposed settlement "must be done by the judge" assigned to the case. The manual suggests that on occasion, "a judge might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy."[11]

[8] *Id.* at 58 (footnotes omitted).

[9] *Id.* at 64-65. In a third case, a district judge appointed a special master to review requests for attorney fees. *Id.* at 65, n.226.

[10] The rates of referral to magistrate judges were 47%, 23%, 20%, and 5%; altogether 27 cases involved a referral. *Id.* at 65.

[11] Manual for Complex Litigation, Fourth 329 (Federal Judicial Center 2004); available at http://www.fj.gov under "Publications," "Manual for Complex Litigation."

"Do Bad Cases Lead to Bad Settlements?" (Panel #2)

Data from both the 1996 and 2004 FJC studies suggest that a substantial majority of cases filed as class action are never certified as class actions and do not lead to class settlements. In the 2004 study, 119 of 486 (24%) of the closed cases filed as class actions were certified and produced a class settlement. In the 1996 study, 152 of 407 (37%) proposed class actions had been certified as class actions, either for settlement or for trial.

2004 FJC Study

Courts and commentators often point to a certification decision as the key decision in setting the course of class actions. Our data support the proposition that class certification is at least one of the key decisions in class action litigation. One should not assume, however, that certified cases had not earlier faced and survived motions to dismiss and motions for summary judgment. The study of 1992-1994 class actions reported that rulings on such motions often preceded any action on class certification.

Table 16 compares survey data for certified and noncertified cases filed as proposed class actions. Cases certified for settlement are included in the certified column.

Table 16: Comparison of case outcomes for closed cases filed as class actions (certified vs. not certified)

Outcomes of Cases	Certified (N=119)	Not Certified (N=367)
Proposed class settlement approved	101 (85%)	Not applicable
Revised class settlement approved	5 (4%)	Not applicable
Class settlement proposed and rejected	1 (1%)	3 (1%)
Case dismissed for lack of jurisdiction	Not applicable	26 (7%)
Case dismissed on merits	5 (4%)	90 (24%)
Case dismissed on other grounds	2 (2%)	Not applicable
Summary judgment granted	None	29 (8%)
Class representatives settled individually	1 (1%)	107 (29%)
Case dismissed voluntarily	Not applicable	103 (28%)
Individual trials held	Not applicable	8 (2%)
Class trial held	5 (4%)	Not applicable

Note: The categories do not add up to 100% because respondents could select more than one category and because other responses have been omitted.

In three-quarters of the not-certified cases that were dismissed on the merits, the ruling on the merits preceded any court action on certification. This follows the pattern observed in the earlier Center study.

The dichotomy between certified and non-certified cases could hardly be clearer. A certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes. A profile of certified cases suggests that they have

> shown classwide merit, at least in the sense of surviving or avoiding motions to dismiss or motions for summary judgment. Certified cases concluded with a court-approved classwide settlement 89% of the time; a few were tried and a few were dismissed involuntarily. Non-certified cases did not show evidence of having classwide merit; they were dismissed by a court, settled on an individual basis, or voluntarily dismissed 97% of the time; a few had individual trials.[12]

1996 FJC Study

> In each district, a substantial majority of certified class actions were terminated by class-wide settlements. Certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. Certified class actions were less likely than noncertified cases to be terminated by traditional rulings on motions or trials. The vast majority of cases that were certified as class actions had also been the subject of rulings on motions to dismiss or for summary judgment, most of which did not result in dismissal or judgment. But noncertified cases were not simply abandoned; in each district, they were at least twice as likely as certified class actions to be disposed of by motion or trial (mostly by motion). Overall, about half of the noncertified cases were disposed of by motion or trial. As to the relationship between class certification and settlement, many cases settled before the court ruled on certification. At the other end of the spectrum, a sizable number—a majority in three of the districts—settled more than a year after certification.[13]

[12] 2004 FJC Study, *supra* note 1 at 43-44.

[13] 1996 FJC Study, *supra* note 1 at 10.

Clear Notices (Panel #3)

The 1996 study examined class action notices from a number of angles, as described in the following excerpt. The 2004 study did not examine notices.

1996 FJC Study

> Settlement notices in the cases did not generally provide either the net amount of the settlement or the estimated size of the class. Rarely would a class member have the information from which to estimate his or her individual recovery. In only five cases, all of which were in two districts, did the notice include information about the size of the class. As to the net amount of the settlement, in one district a third of the notices included such information, in two districts, a fifth did, and in the fourth district, a tenth. Notices included information about the gross amount of the settlement in 64% to 90% of the cases (see Figure 40).
>
> Missing from most disclosures was information about the dollar amount of attorneys' fees, costs of administration, and other expenses. In only one district did more than half of the notices include the dollar amount of attorneys' fees; at the other end of the range, in one district only 10% of the notices included such information (see Figure 41). In all four districts, however, more than two-thirds of the notices included information about either the percentage or the amount of attorneys' fees (see Figure 41). If the fees are calculated as a percentage of the gross settlement and not as a percentage of the net amount (practices differ), then information about the fee percentage and the gross amount of the settlement would suffice because a class member could calculate the fees by multiplying the gross settlement by the percentage to be allocated to fees.
>
> Information about the costs of administration and other expenses, including the attorneys' legal expenses for discovery and other pretrial activity, are infrequently included in the notice of settlement (see Figure 42).
>
> Notices generally included sufficient information on the nonmonetary aspects of the settlement. In each district, more than 75% of the notices presented information on a plan of distribution for the proceeds and also included information and forms for submitting a claim. When equitable relief was included in the settlement, it was generally summarized in the notice. Optout rights, where applicable, were stated in the vast majority of notices and all notices in all four districts specified the date and time for a hearing on approval of the settlement.[14]
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> * * *
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> Having read the notices in these cases presses us to make an additional observation. Many, perhaps most, of the notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader. A content analysis of the samples could test this impression. For any researchers who wish to take up this call for further research, we can make available a file of most or all of the notices we encountered in the four districts. Courts and commentators have agreed that notices should communicate the essential information in "plain English."[15]

[14] *Id.* at 50-51.

[15] *Id.* at 51-52.

Class Action Attorney Fees (Panel #4)

Both FJC studies found that attorney fees typically represent about 25%-30% of the net class recovery.

2004 FJC Study

> Attorney fees and expenses were reported for 103 of 142 cases in which there was a monetary recovery or settlement for a class. The typical case included fees and expenses that amounted to 29% of the total recovery. At the high end, in 25% of cases at least 36% of the total recovery was allocated to attorney fees and expenses. At the low end, in 25% of the cases 9% or less of the recovery went to attorney fees and expenses.[16]

1996 FJC Study

> In most cases, net monetary distributions to the class exceeded attorneys' fees by substantial margins. The fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement (see Figures 67 and 68).
>
> Some distribution cases also included other class relief that the court did not quantify. This occurred about a third of the time in two districts and about 17% and 25% of the time in the other two courts. To the extent that monetary value can be associated with that relief, the data presented in this subsection understate the value of gross settlement and thus possibly overstate fee-recovery rates.
>
> The fee-recovery rate calculations discussed in this subsection do not include cases with no net monetary distribution to class members (no distribution cases), because those settlements contained only equitable or other nonquantifiable relief. Fees and costs comprised all or a large percentage of the settlement funds in those cases.[17]

[16] 2004 FJC Study, *supra* note 1 at 46.

[17] 1996 FJC Study, *supra* note 1 at 68-69 (footnotes omitted).

Valuation of Class Action Settlements (Panel #6)

Two types of questions seem embedded in the topic, one substantive and one procedural. This part discussed the substantive aspects; the material for Panel #2 dealt with some of the procedural aspects.

2004 FJC Study

On the monetary value of class action settlements, the following excerpts describe the results of our survey. Note that fewer than one in four cases had any monetary recovery.

> *Monetary recovery or settlement.* Overall, 142 (23%) of the named cases led to a classwide monetary recovery or settlement; attorneys estimated the amount of recovery in 120 of those cases. The typical recovery or settlement was $800,000; 25% of the attorneys reported recoveries and settlements of $5.2 million or more; and 25% reported $50,000 or less.[18]
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> * * *
>
> Table 14 presents data showing substantial differences in financial recoveries when comparing certified class actions remanded to state courts and certified class actions retained in federal courts. A monetary recovery or settlement was more likely to occur when a federal court retained a case after removal (44%) than after a federal court remanded a case to state court (33%).

Table 14: Comparison of monetary recoveries and settlements and class size in certified closed class actions, by remand

Monetary Recovery/Class Size	Remanded to State Court (N=74)	Removed to Federal Court and Not Remanded (N=118)
Cases with a monetary recovery or settlement*	25 (33%)	52 (44%)
Median amount of monetary recovery or settlement**	$850,000	$300,000
Median size of class**	5,000	1,000
Median recovery per class member	$350	$517

*Differences are statistically significant at the .05 level, based on a chi-square test.
**Differences in the medians are statistically significant at the .05 level, based on a Mann-Whitney test of medians.

> Both the size of the class and the amount of any monetary recovery or settlement were substantially larger in cases remanded to state courts than in cases retained in federal courts. Most of these recoveries were based on settlements approved by judges (see Table 13). The total recovery for the class, of course, represents the benefit to the class that typically serves as the primary basis for the court to calculate attorney fees for

[18] 2004 FJC Study, *supra* note 1 at 45.

class counsel.

In the remanded cases, the median class recovery was $850,000; in the removed cases retained in federal courts, $300,000. From the individual class member's perspective, differences in the amount of recovery, however, were more than compensated by differences in the sizes of the classes. By dividing the reported class size in each case into the total monetary recovery we calculated the recovery per class member. In the retained cases, the typical (i.e., median) recovery per class member was $517, almost 50% higher than the $350 typical recovery in remanded cases. Thus, smaller class recoveries in federal versus state court appear to be a product of the smaller class sizes.[19]

1996 FJC Study

Across the [four] districts, the median level of the average recovery per class member[20] ranged from $315 to $528; 75% of the awards ranged from $645 to $3,341; and the maximum awards ranged from $1,505 to $5,331 (see Figure 1). Even assuming that an individual member might recover a higher award in a separate trial, the multiplier would have to be ten or more for an individual to meet the minimum jurisdictional amount for a diversity case. Cases seeking injunctive relief and cases brought under federal statutory authority could be brought as individual actions. However, without a substantial multiplier of individual damage awards, none of the awards would likely induce a private attorney to bring the case on a contingent fee basis or an individual to advance sufficient personal funds to retain an attorney to file the action. . . .

The median net settlement per class member in the relatively few securities cases ranged from $337 to $447 (see Figure 2). The comparable medians for nonsecurities classes ranged from $275 to $1,472 (see Figure 3). Given the small numbers of cases with monetary settlements in each district, no firm conclusions can be drawn about the differences between securities cases
and all other cases. It does appear, however, that neither level of recovery would have been likely to support individual actions.[21]

* * *

The median number of recipients of notice of certification or settlement or both was substantial, ranging from a median of approximately 3,000 individuals in one district to a median of over 15,000 in another (see Figure 38). In all districts the number of notices sent to individuals equaled or exceeded the estimated number of class members. Generally, parties estimated the size of the class during the certification process, before notices were sent.[22]

[19] *Id.* at 38-39.

[20] We calculated the average recovery per class member by starting with the gross settlement amount, deducting expenses, attorneys' fees, and any separate awards to the named class representatives, and dividing that net settlement amount by the number of notices sent to class members.

[21] 1996 FJC Study, *supra* note 1 at 13 (footnote renumbered)

[22] *Id.* at 48.

Future Research Agendas (Panel #6)

Some possible subjects for future research include

- Effects on response rates of providing "plain language" notices to class members
- Effectiveness of various approaches to judicial evaluation of proposed class settlements
- Administration and monitoring of class settlements: alternative models
- Overlapping and duplicative class action litigation in state and federal courts: filing patterns, judicial activity, and outcomes
- Effects of Federal Rule of Civil Procedure 23(f) (allowing interlocutory appeals at the discretion of the federal courts of appeal) on timing and outcomes of class action litigation